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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 514.

D. B. HEINER, Collector of Internal Revenue, 23rd District of Pennsylvania, Pittsburgh, Pennsylvania,

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN and DOROTHY D. WHITWORTH, Executors and Trustees of the Estate of JOHN W. DONNAN, Deceased, of Washington, Pennsylvania.

BRIEF FOR EXECUTORS.

On Certificate From the United States Circuit Court of Appeals for the Third Circuit.

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BRIEF FOR EXECUTORS.

I.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court on the statutory demurrer is reported in 48 Fed. (2) 1058. The final opinion of the District Court is not officially reported but may be found at #1515 Prentice-Hall 1931 Federal Tax Service. No opinion was handed down by the Circuit Court of Appeals.

II.

JURISDICTION.

The certificate of the Circuit Court of Appeals was filed in the office of the clerk of this Court on November 11, 1931. The jurisdiction of this Court rests upon Section 239 of the Judicial Act, as amended by the Act of February 13, 1925.

III.

QUESTIONS CERTIFIED.

1. Does the second sentence of Section 302(c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

2. If the answer to the first question be in the negative, is the second sentence of Section 302(c) of the Revenue Act of 1926 void because repugnant to Sections 1111, 1113 (a), 1117 and 1122 (c) of the same act?

IV.

LAWS INVOLVED.

The laws, constitutional and statutory, are set forth in the appendix, *infra*.

V.

ARGUMENT.

Summary.

The second sentence of Section 302(c), Revenue Act of 1926, (appendix), provides that a gift (in excess of $5,000) made within two years of death is conclusively presumed to have been made in contemplation of death. Former revenue acts (without the $5,000 exemption) provided for only a rebuttal presumption under such circumstances.

It is beyond the power of the legislature to prohibit proof of the truth, except, possibly, in the case of a national emergency. This is a republican government, founded upon fact, not fiction. A complete and irrevocable gift *inter vivos* is taxable for estate taxes only in the event that it is, in fact, made in contemplation

of death. Classification, if reasonable, is proper, but time, itself, is no reasonable basis for classification. Mentality is, and of right ought to be, free and never fixed by legislative fiat. Classify physical objects but never mentality.

This sentence deprives the taxpayer of his day in court, is arbitrary and capricious, and therefore deprives him of property without due process of law. It is also void for repugnancy, in that it deprives the taxpayer of his right to prove the truth, while later and paramount sections in the same act, which have been characterized by this Court as a complete system of corrective justice, afford him this right.

Question 1. Does the Second Sentence of Section 302(c) of the Revenue Act of 1926 Violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

The executors contend that the tax is not due unless and only in the event that death was, in fact, contemplated. The first sentence of Section 302(c) provides that the property of a decedent transferred without consideration "at any time" is taxable if made in contemplation of death. The first sentence merely puts the burden of proof on the taxpayer to show by the fair preponderance of the evidence that the decedent did not contemplate death. According to the statement of facts of the Circuit Court of Appeals, there is no tax due under the first sentence, because death was not contemplated (R. 2). The third sentence of this section has no application to this case, because it applies to transfers "prior to the enactment of this Act" (Feb. 26, 1926); whereas the transfers here involved were in 1927, subsequent to the enactment of the 1926 Act (R. 1). The executors contend that neither the first nor third sentences establish even a rebuttable presumption

against them, and that their only burden is, as plaintiffs in this cause, to prove the truth.

The collector contends that it is the second sentence of this section under which the transfer and advancement are taxable, irrespective of whether or not they were made in contemplation of death. He contends that, since both the transfer and advancement were made without consideration and within two years of death, they must necessarily be taxable under the second sentence of this section, because this sentence provides that such gifts shall be "deemed and held" to have been made in contemplation of death, and that, no matter whether, in fact, the gifts were not made in contemplation of death, the meaning of the second sentence is clear and the gifts must be taxed. He insists that the words "deemed and held" constitute a conclusive presumption of fact and that the executors are not entitled to introduce evidence of facts tending to rebut this presumption.

The executors concede that the words "deemed and held" in the second sentence constitute a conclusive presumption of fact. They contend, however, that this sentence deprives them of their day in court, is arbitrary and capricious, depriving them of the equal protection of the laws, and therefore violates the due process clause of the Fifth Amendment.

Prior to the Revenue Act of 1926, transfers without consideration, made within two years of death, were presumed to have been made in contemplation of death "unless shown to the contrary". This was a rebuttable presumption under the estate tax provisions. It appeared in every revenue act from 1916 to 1924, inclusive (appendix).

The argument of the executors that the conclusive presumption violates the due process clause of the Fifth

Amendment will be set forth under two points: (1) that it deprives them of their day in court and (2) that it is arbitrary and capricious, depriving them of the equal protection of the laws.

Point (1) Day in Court.

The case most nearly like the one at bar, and upon which the executors chiefly rely, is that of *Schlesinger v. Wisconsin,* 270 U. S. 230. In that case it appeared that a statute of the State of Wisconsin (Wis. Stats. 1919, §1087-1, c. 64 ff) provided that every transfer of a material portion of a grantor's estate without adequate valuable consideration, made within "six years" prior to the death of the grantor, "shall be construed to have been made in contemplation of death within the meaning of this section". The executors of the Schlesinger Estate contended that this provision of the Wisconsin statute violated the "due process of law" clause of the Fourteenth Amendment. In holding the statute unconstitutional, in a six to three decision, this Court, through Mr. Justice McReynolds, said (p. 239):

> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a gradual inheritance tax upon them without regard to the *actual intent.* The presumption is declared to be conclusive and cannot be overcome by evidence. *It is no mere prima facie presumption of fact.*
>
> "* * * Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made *without regard to actualities,* while *like* gifts at other times are not thus treated. There is no adequate basis for this distinction. * * *
>
> "The presumption and consequent taxation are

defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A. may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against B. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." (Italics supplied)

Exactly eight months later (November 1, 1926) this Court in the case of *Uihlein et al. v. Wisconsin,* 273 U. S. 642, in a *per curiam* decision, again declared the same Wisconsin statute to be unconstitutional "on the authority of *Schlesinger v. Wisconsin*".

The Supreme Court of the State of Kentucky, in the case of *State Tax Commission v. Robinson's Ex'r.*, 28 S. W. (2) 491, was called upon to pass upon the constitutionality of a Kentucky statute (Ky. St. §4281 a-1, subsec. 2) which provided that every gift of property made within "three years" prior to a donor's death shall be "construed to have been made in contemplation of death". The Supreme Court of Kentucky held this statute unconstitutional on the authority of the Schlesinger case.

The decision of the District Court below holding the statute unconstitutional is now supported by the decisions of six other tribunals. The second sentence of Section 302(c) of the Revenue Act of 1926 has been declared unconstitutional by three other district courts, two circuit courts of appeal and the Board of Tax Appeals in the cases of *Hall v. White,* 48 Fed. (2) 1060, affirmed by the United States Circuit Court of Appeals

for the First Circuit, 53 Fed. (2) 210; *Guinzburg v. Anderson,* 51 Fed. (2) 592, affirmed on December 7, 1931, by the United States Circuit Court of Appeals for the Second Circuit, #2199 Prentice-Hall 1931 Federal Tax Service (not yet officially reported); *Delaware Trust Co. v. Handy,* 51 Fed. (2) 867, 53 Fed. (2) 1042, (on certificate to this Court from the Circuit Court of Appeals below, #546 October Term, 1931), and *Lincoln v. Commissioner,* 24 B. T. A. 334; all on the authority of *Schlesinger v. Wisconsin.*

It would seem, then, that this phase of the question had been settled by the Schlesinger case. However, in support of an affirmative answer to this question, we now cite in this brief cases having to do generally with conclusive and rebuttable presumptions. An examination of these cases, we believe, will clearly show that, whenever the question was squarely raised and decided, no court has ever held valid a conclusive presumption of fact, but that, on the contrary, every conclusive presumption of fact has been declared invalid, with the possible exception of one case having to do with an emergency war measure.

Taking up, first, those cases in which the courts have declared invalid conclusive presumptions of fact, we find that in the case of *United States v. Klein,* 80 U. S. 128, this Court was called upon to consider the constitutionality of an Act of Congress, July 12, 1870, 16 Stat. at L. 235, which provided that whenever any pardon shall recite that a person took part in the late rebellion and was guilty of disloyalty to the United States, and the pardon is accepted without disclaimer of guilt, such pardon and the acceptance thereof "shall be taken and deemed * * * conclusive evidence that such person did take part in and give aid and comfort to the late rebellion * * *". In holding this statute

unconstitutional, this Court, speaking through Mr. Chief Justice Chase, said (p. 147):

> "We think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

In the case of *Manley v. Georgia,* 279 U. S. 1, this Court was called upon to pass upon the constitutionality of a statute of the State of Georgia (Georgia Laws 1919, Sect. 28, Art. XX), in which it was provided that every insolvency of a bank shall be "deemed" fraudulent, that the president and directors shall be severely punished by imprisonment, but that the defendant in such a case "may repel the presumption of fraud" by showing that the affairs of the bank had been fairly and legally administered. This Court, through Mr. Justice Butler, held the state statute unconstitutional, saying (p. 5):

> "If the presumption is not unreasonable *and is not made conclusive* of the rights of the person against whom raised, it does not constitute a denial of due process of law. * * * A statute creating a presumption that is arbitrary or that *operates to deny a fair opportunity to repel* it violates the due process clause of the Fourteenth Amendment. * * * *Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.*" (Italics supplied)

Looking now to the decisions of the lower federal courts and the state courts, we find that the United States Circuit Court for the Northern District of California, in the case of *Southern Pacific R. R. Co. v. Board of R. R. Commissioners of California,* 78 Fed. 236, was called upon to determine the validity of a provision of the constitution of the State of California (Art. 12, §22), which provided that, in all controversies, the rates of fares and freights established by the Board of Rail-

road Commissioners shall be "deemed conclusively" just and reasonable. In holding this provision of the California constitution invalid, Circuit Judge McKenna, speaking for the court, said (p. 258):

> "It is, in effect, admitted, or, at any rate, it is established by authority, that the provision which gives conclusiveness to the rates fixed by the commissioners, is void; * * *."

In the case of *Stuart v. Palmer,* 74 N. Y. 183, the Court of Appeals of New York held invalid a statute of that state (New York Laws 1870, c. 619) which provided for an assessment of taxes without notice, hearing or opportunity to be heard or reviewed.

A statute of the State of Kansas (Kan. Laws 1893, c. 100) provided that in any action brought against any railroad company for failure or neglect to deliver grain, either duplicate of a bill of lading shall be "conclusive proof" of the amount of such grain received by the railroad company. In holding this statute unconstitutional, the Supreme Court of Kansas, in the case of *Missouri, Kansas & Texas Railway Co. v. Simonson,* 64 Kan. 802, said (p. 803):

> "But it is not within the power of the Legislature *to exclude from the courts that which proves the truth of a case,* nor on the other hand, to compel them to receive that which is false in character." (Italics supplied)

In the case of *Vega Steamship Company v. Consolidated Electric Co.,* 75 Minn. 308, 77 N. W. 973, the Supreme Court of Minnesota held invalid a state statute (Minn. Laws 1894, §7675) which provided that a certificate of a weighmaster shall be "conclusive upon all parties as to the matters contained in said certificate."

In the case of *Graves v. Northern Pacific R. R. Co.,* 5 Mont. 556, 6 Pac. 816, the Supreme Court of Montana

held unconstitutional a state statute (Mont. Laws 1881, approved Feb. 23) which provided that a railroad company was liable for cattle killed by it at a valuation to be "conclusively" fixed by appraisers.

In the case of *McCready v. Sexton,* 29 Iowa 356, the Supreme Court of Iowa held unconstitutional a state statute (Iowa Laws, Revision, §784) which declared a tax deed to be "conclusive evidence" of compliance with those matters which are essential to the exercise of the taxing power.

In the case of *Taylor v. Anderson,* 40 Okla. 316, 137 Pac. 1183, the Supreme Court of Oklahoma held unconstitutional a state statute (Okla. Laws 1913, c. 24, p. 41) which provided that the findings of a weighmaster shall be conclusive evidence of weight.

In *Winn v. Whitehouse,* 96 Ark. 42, the Supreme Court of Arkansas held unconstitutional a state statute (Kirby's Digest, Sect. 4820) which provided that the deeds of a commissioner shall be "conclusive evidence" in all courts of a good and valid title in the donee.

In the case of *Wantlan v. White,* 19 Ind. 470, the Supreme Court of Indiana, in an action for a writ of habeas corpus, was called upon to pass upon the constitutionality of an Act of Congress, Feb. 18, 1862 (Acts of 1862, p. 339), which provided that "the oath of enlistment taken by the recruit shall be conclusive as to his age". In holding this provision invalid, the Supreme Court of Indiana said (p. 472):

> "Now it is difficult to see how the oath of a boy that he is eighteen years old can make him so, if, in fact, he has not been in existence for eighteen years; and it has been held, and it would seem that the decision must be correct, that it is not competent for the legislative power to declare what shall be *conclusive* evidence of a fact." (Italics supplied)

Taking up now those cases in which the courts have approved or declared valid rebuttable presumptions of fact, we find that this Court, in the case of *Marz v. Hawthorn,* 148 U. S. 172, was called upon to pass upon the constitutionality of a statute of the State of Oregon (Ore. Laws 1887, 2 Hill's Ann. Laws, 1309 ed. 1892) which provided that a tax deed shall be "*prima facie* evidence" of the title of the grantee. In sustaining the validity of the statute, this Court, through Mr. Justice Shiras, said (p. 182):

> "It is competent for the legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, *conclusive* of its own validity, and it cannot, therefore, make the tax deed *conclusive* evidence of the holder's title to the land." (Italics supplied)

In the case of *Fong Yue Ting v. U. S.,* 149 P. S. 698, this Court was considering the validity of a federal statute (Act of Cong. May 5, 1892, c. 60, §6) which required all Chinese laborers within the United States to apply for a certificate of residence, and that any Chinese laborer who did not so apply or was afterwards found without such a certificate should be "deemed and adjudged" to be unlawfully in the United States, "unless" he shall clearly establish to the satisfaction of the court that, by reason of accident, sickness or other unavoidable cause, he was unable to procure his certificate. In sustaining the validity of this statute, this Court, through Mr. Justice Gray, said (p. 727):

> "The meaning of this clause, as shown by those which follow, is *not* that this fact shall thereupon

> be held to be *conclusively* established against him, but only that the want of a certificate shall be *prima facie* evidence that he is not entitled to remain in the United States; * * *" (Italics supplied)

In the case of *Turpin v. Lemon*, 187 U. S. 51, Mr. Chief Justice Brown, speaking for this Court, sustained the constitutionality of a statute of the State of West Virginia (W. Va. Laws 1882, c. 130, sec. 29) which provided that a tax deed shall be *"prima facie* evidence" that the material facts therein recited are true. And, in considering generally the right of a legislature to conclusively determine what it enacts in the form of law, this Court, in *Smyth v. Ames*, 169 U. S. 466, speaking through Mr. Justice Harlan, said (p. 527):

> "The idea that any legislature, state or federal, can *conclusively* determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions." (Italics supplied)

In *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 193 U. S. 53, Mr. Justice McKenna, speaking for this Court, said (p. 63):

> "To establish stations at proper places is the first duty of a railroad company. The State can certainly provide for the enforcement of that duty. An incorporated village might be said to be such a place without an express declaration of the statute. To make it *prima facie* so by statute and to impose the burden of meeting the presumption thence arising certainly does not amount to an invasion of the rights of property or an unreasonable control of property." (Italics supplied)

The leading case involving the validity of rebuttable presumptions is *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, Administrator,* 219 U. S. 35. In that case this Court was called upon to determine whether a statute of the State of Mississippi (Miss. Code 1906, Sec. 1985) was repugnant to the Fourteenth Amendment to the Constitution in providing that in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives shall be *"prima facie"* evidence of the want of reasonable skill and care on the part of the railroad company. In holding the statute constitutional, this Court, through Mr. Justice Lurton, said (p. 43):

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it *must not,* under guise of regulating the presentation of evidence, *operate to preclude* the party from the right to present his defense to the main fact thus presumed." (Italics supplied)

In the case of *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, Mr. Justice Van Devanter, speaking for this Court, held valid a state statute (N. Y. Laws 1908, Vol. 2, 1221, c. 429) which provided that the proof of certain designated facts shall be *prima facie* evidence of the common source of the waters and of the injurious effect of the pumping. Said this Court (p. 82):

> "The statute now before us, as affected by the

ruling mentioned, makes proof of certain designated facts *prima facie, but not conclusive,* evidence of the common source of the waters and of the injurious effect of the pumping, that is to say, it establishes a *rebuttable* presumption, but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense." (Italics supplied)

A statute of the State of Kansas (Kan. Laws 1907, c. 373, pp. 538, 539) made entries of default and proceedings for forfeiture *prima facie* evidence of the validity of forfeiture proceedings. The validity of this statute was before this Court in the case of *Reitler v. Harris,* 223 U. S. 437. Mr. Justice Van Devanter, in speaking for this Court, said (p. 442):

"By making the entry of forfeiture upon the official record *prima facie, but not conclusive,* evidence that all preliminary steps essential to a valid forfeiture were taken and that the forfeiture was duly declared, it but established a *rebuttable* presumption, which he is at liberty to overcome by other evidence. That such a statute does not offend against either the contract clause or the due process of law clause of the Constitution, even where the change is made applicable to pending causes, is now well settled." (Italics supplied)

In the case of *Luria v. U. S.,* 231 U. S. 9, this Court was called upon to pass upon the constitutionality of a federal statute (Act Cong. June 29, 1906, c. 3592, 34 Stat. 596, 601), which provided that if any alien, within five years after obtaining a certificate of citizenship, shall return to his native country and take permanent residence therein, it shall be considered *"prima facie"* evidence of lack of intention on the part of such alien to become a permanent citizen of the United States at

the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient to authorize the cancellation of his certificate. In sustaining the constitutionality of this statute, this Court, through Mr. Justice Van Devanter, said (p. 25):

> "It will be observed that this provision prescribes a rule of evidence, not substantive right. It goes no farther than to establish a *rebuttable presumption* which the possessor of the certificate is free to overcome." (Italics supplied)

In *Meeker & Co. v. Lehigh R. R.*, 236 U. S. 412, this Court held that the reports and orders of the Interstate Commerce Commission are admissible as *"prima facie"* evidence of facts found and contained therein under the federal statute there involved (Act Congress June 29, 1906, Sect. 16, 34 Stat. 590).

The California Alien Land Law (Calif. Laws 1921, p. Lxxxiii, Sect. 9) provided that acquisition of lands by aliens not eligible to citizenship is unlawful, and that a conveyance to such an alien creates a *prima facie* presumption that the conveyance was made with intent to avoid escheat. This Court, in the case of *Cockrill v. California*, 268 U. S. 258, speaking through Mr. Justice Butler, sustained the validity of this statute, saying (p. 261):

> "It is not, and could not reasonably be, suggested that the statute is repugnant to the due process clause. *It does not operate to preclude any defense.*" (Italics supplied)

In commenting upon the rebuttable presumption in Section 402(c) of the Revenue Act of 1918, (appendix), which provided that any transfer without consideration, made within two years of death, shall be presumed to have been made in contemplation thereof,

"unless shown to the contrary", this Court, in the case of *Wickwire v. Reinecke,* 275 U. S. 101, speaking through Mr. Chief Justice Taft, said (p. 105):

> "It is quite clear that, as held by the Circuit Court of Appeals, the ruling of the trial court was erroneous, and that the decision of the Commissioner of Internal Revenue was *not conclusive,* but only furnished *prima facie* evidence of its correctness * * *
>
> "Upon the issue whether the transfer had been made in contemplation of death, the burden of proof was by the terms of the statute on the petitioner, as indeed it would have been without the special provision of the statute, *because he was the plaintiff.*" (Italics supplied)

In the case of *Ferry v. Ramsey,* 277 U. S. 88, this Court was called upon to pass upon the validity of a state statute (Kan. Laws 1923, c. 9, §164) which provided that the reception of deposits by a banking institution when insolvent shall be *"prima facie"* evidence of knowledge of insolvency on the part of the officers. This Court, through Mr. Justice Holmes, sustained the validity of this statute, saying (p. 94):

> "* * * If without any mention of assent or presumptions or *prima facie* evidence that statute had said: 'Every director of a bank shall be personally liable to depositors for every deposit accepted by the bank after it has become insolvent', all objections would be met by the answer, 'You took the office on those terms'. * * * The mention of assent and evidence of knowledge cannot be pressed to conclusions that the statute manifestly does not allow. * * * But the essential thing is that, whether in a roundabout or a perfectly natural way, the statute has said if you take the office you

must take the consequences of knowledge whether you have it or not."

Looking now to the decisions of the lower federal courts and the state courts, we find that in the case of *Goodlett v. Goodman Coal & Coke Co.*, 192 Fed. 775, the United States Circuit Court of Appeals for the Sixth Circuit, in passing upon a state statute (Tenn. Laws, Shannon's Code, §3748, p. 893) which provided that an instrument proved and acknowledged by the maker or two subscribing witnesses shall be received as evidence in any of the courts of the state, said (p. 778):

> "What is the object of this legislation? It is not contended, as in reason it could not be, that it is beyond the power of the Legislature to enact that instruments, safeguarded as these are, shall be admissible as *prima facie* evidence, *of course not as conclusive evidence.*" (Italics supplied)

The same circuit court of appeals, in the case of *Shwab v. Doyle*, 269 Fed. 321, commented upon the rebuttable presumption feature of Section 202(b) of the Revenue Act of 1916, as amended (appendix), which provided that any transfer without consideration, made within two years of death, shall be presumed to have been made in contemplation thereof "unless shown to the contrary". The court said (p. 333):

> "The presumption is merely a rule of evidence whose enactment is within the legislative competency."

In the case of *Flannery v. Willcuts*, 25 Fed. (2) 951, the Circuit Court of Appeals for the Eighth Circuit had under consideration the same rebuttable presumption involved in the case of *Wickwire v. Reinecke, supra.* In commenting upon this rebuttable presumption, the Circuit Court of Appeals said (p. 953):

"* * * It seems reasonable to suppose that the taxing officials also acted solely in reliance on the statutory presumption; but if that presumption is inconsistent with the facts in the case it must give way. It will have served its purpose,—in effect, so declared by the statute. * * *"

In the case of *In re Lydia Ann Allen,* 82 Vermont, 365, the Supreme Court of Vermont had under consideration the force and effect of a physician's certificate which recited that the petitioner was insane. In holding that the certificate could not be made conclusive of insanity, the court said (p. 376):

"* * * It is, however, within the power of the legislature to prescribe that such a certificate, made in full compliance with the provisions of the statute authorizing it, shall be received as evidence of insanity, and the effect of it, before a court of inquiry, like the one here under consideration, with the modification that it has no power under the pretense of prescribing rules for the presentation of evidence, to go so far as *altogether to preclude* the alleged insane person from establishing his rights in opposition thereto." (Italics supplied)

In the case of *New Orleans, Mobile & Chicago R. R. Co. v. Cole,* 101 Miss. 173, the Supreme Court of Mississippi, following the case of *Mobile, Jackson & Kansas City R. R. v. Turnipseed, supra,* held that when proof is made of injury inflicted by the running of a locomotive and cars of a railroad company, the rebuttable presumption of negligence provided for in the statute (Miss. Laws, Code 1906, §1985) is valid.

In the case of *Columbia Valley Trust Co. v. Smith,* 56 Oregon 6, the Supreme Court of Oregon held valid a statute of that state (Ore. Laws 1905, p. 111), which

provided that a certified copy of the articles of incorporation of a corporation shall be *"prima facie"* evidence of the existence of such corporation and its right to do business. In that case the court said (p. 11):

> "* * * A statute which makes a writing that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party, does not deprive the adverse party of the right freely and fully to prevent at a trial facts tending to prove his theory, but imposes upon him the burden of overcoming the *prima facie* case that was made by receiving the document in evidence."

The above cases are those in which the courts, federal and state, have ruled or commented upon the validity or invalidity of statutory presumptions. An analysis of all of these cases shows that this Court has twice declared unconstitutional a conclusive presumption of fact in the same state statute, has once declared unconstitutional a rebuttable presumption in a federal statute, and has once declared unconstitutional a rebuttable presumption in another state statute; that a United States Circuit Court has declared unconstitutional a conclusive presumption in a state constitution; that four United States District Courts, two United States Circuit Courts of Appeal and the United States Board of Tax Appeals have declared unconstitutional a conclusive presumption in the same federal statute; and that nine state supreme courts have declared unconstitutional conclusive presumptions in state statutes. On the other hand, this Court has approved or declared valid rebuttable presumptions in thirteen different federal and state statutes; two circuit courts of appeal in three different cases have approved rebuttable presumptions in federal and state statutes; and three state

supreme courts have approved rebuttable presumptions in state statutes. These cases abundantly show that all courts have zealously protected the right of the citizen to have his day in court, with full opportunity to be heard. And this protection is afforded against federal as well as against state legislation. Under the Fifth Amendment Congress is prohibited from denying one his day in court just as much as the states are prohibited under the Fourteenth Amendment from denying one his day in court. (*Blackmer v. U. S.*, decided by this Court on February 15, 1932).

There are six other cases, however, in which the *meaning* of statutory presumptions has been considered by the courts and which, at first blush, might seem to indicate that conclusive presumptions are valid. They are the cases of *Harder v. Irwin,* 285 Fed. 402; *U. S. v. Davis,* 50 Fed. (2) 903; *Cardinel v. Smith,* 5 Fed. Cas. 45, #2395; *Michel v. Nunn,* 101 Fed. 423; *Edwards v. Douglas,* 269 U. S. 204; and *Leland v. Commissioner of Internal Revenue,* 50 Fed. (2) 523 (certiorari denied October 26, 1931; rehearing denied November 23, 1931).

In the Harder case, the United States District Court for the Northern District of New York had under consideration the construction of the dividend provision of Section 31(b), Revenue Act of 1917, c. 63, Title XII, 40 Stat. 300, 338, which provided that a distribution by a corporation to its stockholders "shall be deemed to have been made from the most recently accumulated undivided profits and surplus." The court (Cooper, J.) held that (p. 406):

> "The statute *means* that, regardless of the form of the declaration, it is *conclusively presumed* that the distribution is out of the most recently accumulated undivided profits or surplus." (Italics supplied)

In the Davis case, the United States District Court for the Western District of Missouri was called upon to pass on a substantially similar dividend provision in Section 201(e) of the Revenue Act of 1918, 40 Stat. 1060. In that case the court held (p. 904):

> "My view is that the construction contended for by plaintiff is the right one. I can add nothing to what was said by Judge Cooper of the Northern District of New York in *Harder v. Irwin, Collector*, 285 Fed. 402, as to the true *meaning* of the word. It was held by him that the word 'deemed' must be construed as raising a conclusive presumption.
>
> "2. Defendants suggest in briefs that if the statute is so construed it is invalid. The *issue* of constitutionality, however, is not raised in the answer (a mere general denial) and I do not consider it. *12 Corpus Juris* 784." (Italics supplied)

In the Cardinel case, the United States Circuit Court for the District of California was called upon to determine the meaning of a federal statute (Act Cong. July 13, 1866, 14 Stat. 144) which provided that any person who shall offer or expose for sale any of certain designated articles shall be "deemed" the manufacturer thereof, and subject to all the duties, liabilities and penalties imposed by law in regard to the sale of domestic articles without the use of proper stamps denoting the tax paid thereon. In construing the word "deemed" the court said (p. 47):

> "* * * The word 'deemed', in this connection *means* 'judged', 'determined', and when it is enacted that vendor of an article shall for any purpose, 'be deemed the manufacturer thereof', for such purpose, he is to be absolutely considered such manufacturer." (Italics supplied)

In the Michel case, the United States Circuit Court for the Middle District of Tennessee had before it for consideration a federal statute (Rev. Stats. #3244) which provided that every person who, without rectifying distilled spirits, shall, by mixing such spirits with any material, manufacture any compound liquor for sale, shall be "regarded" as a rectifier and as being engaged in the restifying business. In charging the jury, the court said (p. 424):

> "* * * the statute has undertaken to give its own definition, which may, if congress chooses to give such a definition, differ from the ordinary *understanding* of what would be a rectifier." (Italics supplied.

In the Edwards case, this Court was called upon to consider the same dividend provision of the Revenue Act of 1917 as that involved in the Harder case, *supra*. The government contended that the dividends paid in 1917 were conclusively presumed to have been paid of 1917 earnings. In holding that the dividends were taxable at 1917 rather than at 1916 rates, this Court, through Mr. Justice Brandeis, said (pp. 207, 217):

> "The Government contends that * * * the 1917 dividends are conclusively presumed to have been paid out of 1917 earnings.
>
> "To accomplish the purpose of Congress it was necessary that the dividend be deemed to have been paid out of the *available* profits or earnings of the most recent year or years." (Italics supplied)

Following the decision of this Court in the Edwards case, the United States Circuit Court of Appeals for the First Circuit in the Leland case had before it for consideration the dividend provisions of Sections 201(a), (b) and (c) of the Revenue Acts of 1921 and 1924, 42 Stat. c. 136, p. 227, and 42 Stat. c. 234, p. 253, respec-

tively, which were substantially similar to the dividend provisions of the Revenue Acts of 1917 and 1918 involved in the Harder and Davis cases, *supra*. In the Leland case, the Circuit Court of Appeals, relying upon the decision of this Court in the Edwards case, said (p. 525):

> "Nor do we think Congress exceeded its constitutional power by providing that, *so long as* a corporation has on hand earnings and profits accumulated since 1913, any distribution to its stockholders should be *conclusively presumed* to be a dividend out of such earnings or profits. It is evident that Congress intended that a stockholder to whom distributions were made while a corporation had earnings or profits on hand, should not escape the burdens of the income tax law through the directors of the corporation undertaking to make distributions from some other source. *The statute does not convert what is not income into income.* It simply requires that, *while there are* earnings or profits, the distributions to the stockholders shall be made from such earnings or profits, and any distributions made while such earnings or profits *exist* shall be deemed to have been so made." (Italics supplied)

In the Harder, Davis, Cardinel and Michel cases the question of constitutionality was not raised in the pleadings or passed on by the courts. Although this Court in the Edwards case presumably characterized the dividend provision there involved as a conclusive presumption, nevertheless, it did not expressly pass upon its constitutionality, as that question was not raised, nor should it have been; for, as Mr. Justice Brandeis pointed out, this provision was directed to "available" profits and earnings of the most recent

year. In other words, this Court held that the intention of Congress was to tax 1917 dividends at 1917 rates, if, in fact, there were 1917 available earnings. This provision did not, in reality, conclusively determine facts, but merely provided for a conclusive *tax rate based upon facts.* As said by the Circuit Court of Appeals in the Leland case:

> "The statute does not convert what is not income into income."

The statute in the case at bar, however, has converted what is not an asset of the estate into an asset of the estate.

These six cases had to do with the *meaning* of statutes, not the constitutionality thereof. Consequently, none of this group of six cases is authority for the question here involved.

There is one other case, however, in which this Court has held valid a legislative definition of fact. It is the case of *Ruppert v. Caffey,* 251 U. S. 264 (and the related *National Prohibition Cases,* 253 U. S. 350). In that case this Court had before it for consideration the constitutionality of the National Prohibition Act (Act Cong. Oct. 28, 1919, Title I, §1), which provided, among other things, that intoxicating liquors shall be "construed" to mean any liquors which contain in excess of one-half of one per centum of alcohol. This Court sustained the validity of this act on the ground that it was a "war power" of Congress enacted "to promote the Nation's efficiency in men, munitions and supplies * * *" and to effectively enforce the Selective Service Act, which made it "unlawful" to sell intoxicating liquors to soldiers in uniform. Said this Court (pp. 297, 298):

> "Furthermore, recent experience of the mili-

tary forces had shown the necessity of fixing a definite alcoholic test for the purpose of administering the limited prohibitory law included in the Selective Service Act of May 18, 1917, * * * *"

It would seem, then, that a national emergency may justify a legislative definition of fact. However, there is no national emergency involved here, unless it should appear that the Government is becoming bankrupt merely through evasion of estate taxes.

An emergency war measure should not be held as authority for the proposition that Congress may define any fact so long as in the opinion of Congress it is reasonably necessary. There was no alternative to the National Prohibition Act in order to effectively enforce the limited provision in the Selective Service Act against selling intoxicating liquors to soldiers in uniform, but there is an alternative to the conclusive presumption in the estate tax act; in fact there are two alternatives: either re-enact the rebuttable presumption, which is fair, or re-enact a gift tax act which will in *every* case tax gifts *inter vivos*. A gift tax act is constitutional. *Bromley v. McCaughn*, 280 U. S. 124. In Appendix B of the collector's brief there is shown the tendency (among the several states) toward the rebuttable presumption and the abolition of the conclusive presumption.

It is respectfully submitted, therefore, that, in the absence of a showing of a national emergency,, the case of *Ruppert v. Caffey* is not authority for the question here involved.

The statute in question is no more valid than would be statutes which provided that:

(1) Any cohabitation between husband and wife

after the filing of a libel in divorce shall be deemed conclusive evidence of collusion.

(2) The driving of an automobile through a red light or an injury inflicted by the running of a locomotive shall be deemed conclusive evidence of negligence.

(3) The acknowledgment of a married woman in the presence of her husband shall be deemed conclusive evidence of duress.

(4) The drawing of a will by a legatee shall be deemed conclusive evidence of undue influence.

(5) The signature to any document shall be deemed conclusive evidence that the document was read by the person so signing.

(6) The obtaining of a marriage license shall be deemed conclusive evidence of a promise to marry.

(7) The information set forth on a corporate tax return shall be deemed conclusive evidence of the value of corporate assets.

(8). The findings of commissions and boards shall be deemed conclusive evidence of weights, values, quantity, quality, etc.

And so, illustration after illustration may be given to show the length to which Congress may go in legislating facts, if the statute in question be valid, and yet in every one of the above instances there may be an honest and reasonable explanation contradicting the conclusive presumption.

It is one thing merely to tax all complete and irrevocable gifts made within two years of a particular event and quite another thing to provide that all such gifts within two years of a particular event are conclusively

presumed to have been made in contemplation of the particular event and are therefore taxable. Even in the first case, if the particular event were death, the omission of the definition would not save the statute, if the statute were an enactment for the imposition of estate taxes, because estate taxes on complete and irrevocable gifts *inter vivos* are laid *only* upon the theory of contemplation of death, so expressed in the statute. That is to say, an *estate* tax cannot be laid merely upon complete and irrevocable gifts made within two years of the donor's death, because there is no transfer as "at death", and consequently no theory at all upon which to base such a tax.

The cases cited in Appendix C of the brief for the collector, with the exception of *Ruppert v. Caffey, supra, National Prohibition Cases,* 253 U. S. 350, and *Hawkins v. Bleakly,* 243 U. S. 210, are not in point. There were no legislative definitions in the statutes there involved. In *Powell v. Pennsylvania,* 127 U. S. 678, the prohibition was directed against all sales of oleomargarine, without a definition of quality. In *Jones v. Brim,* 165 U. S. 180, the statute was directed against driving cattle over certain highways, without a definition of negligence. In *Hawker v. N. Y.,* 170 U. S. 189, the prohibition was directed against the practice of medicine except by persons of good character, but there was no definition of character. In *Otis v. Parker,* 187 U. S. 606, the prohibition was directed against all sales of stock on margin, but there was no definition of either *bona fide* sales or gambling sales. In *Silz v. Hesterberg,* 211 U. S. 31, the prohibition was directed against the possession of certain types of game, but there was no definition of either domestic game or of foreign game. In *Purity Extract Company v. Lynch,* 226 U. S. 192, the prohibition was directed against the sale of malt liquors,

but there was no definition of malt liquors. The case of *Hebe Co. v. Shaw,* 248 U. S. 297, was concerned with a prohibition directed against sales of adulterated condensed milk, but the statute did not contain any definition of wholesomeness. In the case of *Pierce Oil Corp. v. City of Hope,* 248 U. S. 498, the prohibition was directed against the storage of gasoline within certain districts, but there was no definition of danger. In *Everard's Breweries v. Day,* 265 U. S. 545, and in *Lambert v. Yellowley,* 272 U. S. 581, the prohibition was directed against prescribing intoxicating malt and spirituous liquors by physicians, but there was no definition of intoxicating or malt liquors nor the injurious effect thereof. In *Euclid v. Ambler Co.,* 272 U. S. 365, the prohibition was directed against the establishment of industries in certain districts, but there was no definition of offensiveness or danger.

In *Hawkins v. Bleakly,* 243 U. S. 210, an attack was made by an employer against a number of provisions in the Elective Workmen's Compensation Act of the State of Iowa. One of these provisions provided that if it should be found that an employer had requested an employee to elect to reject the act, the rejection should be conclusively presumed to have been procured through fraud and should be null and void. In passing upon this particular provision of the act, this Court said that the provision is a "permissible" regulation in aid of the general scheme of the act"; after, however, recognizing the doctrine "that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees * * *". Hence it would seem that the sanction of this Court to this particular provision was merely by way of *obiter dictum.* The case of *Ruppert v. Caffey,* 251 U. S. 264 (and the *National Prohibition Cases,* 253 U. S. 350, on the same subject) has been discussed *supra.*

Consequently, the cases cited in Appendix C of the brief for the collector are not authority for the constitutional validity of the statute in question, because, under the provisions of the statute in question, the tax is not merely laid upon all complete and irrevocable gifts made within two years of death, but a definition of such gifts is made and then the tax is laid, based solely upon the definition. The statute in question provides for a conclusive definition of fact, whereas eleven of the fourteen cases cited in Appendix C of the collector's brief provide for conclusive *enforcement,* based, however, upon fact, not upon fiction.

The legislature may not lay an income tax based upon a fiction which is contrary to the fact. It was so held by this Court in *Hoeper v. Tax Commission of Wisconsin et al.,* 52 S. Ct. 120, in an opinion by Mr. Justice Roberts, in part, as follows (p. 122):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income."

Likewise, the legislature should not lay an estate tax based upon a fiction which is or may be contrary to the fact. The fiction may be fact in some cases, but the claimed necessity to prevent estate tax evasion in those cases is no ground to validate the act. Constitutional rights are superior to this claimed necessity. *Schlesinger v. Wisconsin and Hoeper v. Tax Commission of Wisconsin et al., supra.*

Under the second sentence of Section 302(c) here involved, the executors are denied *all* opportunity to

show the facts. Actual intention, thought, belief, motive, age, health, value, etc., should always be left open to proof; never determined by legislative fiat. The statute in question is a legislative definition of what a gift in contemplation of death is. Under it, fiction has supplanted fact, and we become a government of unreality, not of truth.

The difference between the Schlesinger case and the case at bar is that one involves a state law and a six-year period and the other a federal law and a two-year period. There is no material difference between federal legislation, as such, and state legislation, as such. Nor is there any material difference between a six year period and a two year period. The reasonableness of the length of any given period is immaterial to the question here involved. The decision of this court in the Schlesinger case did not rest upon the unreasonableness of a six year period but upon the disregard for actualities and the discrimination between like gifts made at different times. Consequently, the difference between the Schlesinger case and the case at bar is one of degree, not of principle.

If the conclusive presumption here involved be declared valid by this Court, upon what ground shall this Court hereafter reject another conclusive presumption? It is submitted that there is no middle course for this Court to follow. If the bars which prohibit legislation of this sort are to be let down in this case, then utter confusion will be the probable final result. (*U. S. v. MacIntosh*, 51 S. Ct. 570, 575.)

In his dissenting opinion in the Schlesinger case, Mr. Justice Holmes said (p. 241):

> "If the time were six months instead of six years I hardly think that the power of the state

to pass the law would be denied, as the difficulty of proof would warrant making the presumption absolute; and while I should not dream of asking where the line can be drawn, since the great body of law consists in drawing lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall."

The executors do respectfully deny the power of the state to pass a six months' law, or any other period of conclusiveness, no matter how long or short it may be, even though suspicion may suggest that large gifts within a short period before death possibly were made in anticipation of it. On the other hand, there are accidental death cases and those cases such as *Hall v. White, supra,* where the gift was a wedding present to a daughter; cases in which there could be no suspicion that death was anticipated.

A gift made, not in contemplation of death, on March 1, 1927, is a fact at that time, although death within two years therefrom is said to change the fact. If a fact *actually* existed on one date, can a subsequent event, over which there is no control, retroactively change that fact to something else? We submit that it cannot.

Should truth ever be immaterial? Is it ever necessary to violate the Constitution? The decision of this Court on this phase of the question is of the profoundest importance. It would almost seem that this Court is now about to determine the materiality of truth in daily life, for taxation is but a part of the field of general legislation. It is respectfully urged that this Court disaffirm the type of legislation which provides for fic-

tion instead of fact, unless there exists a national emergency.

The collector urges that the tax in question is payable by the estate of the donor and therefore is distinguishable from the Wisconsin tax in the Schlesinger case, which was payable by the donee. What difference does it make whether it is called an estate tax and payable by the estate or whether it is called an inheritance tax and payable by the beneficiary? In both cases the tax is laid on a transfer occasioned by death and the practical operation and effect of the conclusive presumptions are the same in each case.

The collector also urges that the rebuttable presumption is ineffective. That is to say: the administrative or judicial branches of the government, or both, cannot or do not effectively enforce the law. There is nothing in the record to support this contention, nor is it material to the question here involved. However, the federal courts and the Board of Tax Appeals, to say nothing of unreported cases in the Bureau of Internal Revenue, have effectively enforced the rebuttable presumption under prior revenue acts in the following cases, in which the gifts there involved were held to have been made in contemplation of death:

Schwing v. Com. of Int. Rev., 3 B. T. A. 697.
Ward v. Com. of Int. Rev., 3 B. T. A. 879.
Kahn v. Com. of Int. Rev., 4 B. T. A. 1289.
Dupignac v. Com. of Int. Rev., 6 B. T. A. 278.
Lehman v. Com. of Int. Rev., 6 B. T. A. 791.
Serrien v. Com. of Int. Rev., 7 B. T. A. 1129.
Kelly v. Com. of Int. Rev., 8 B. T. A. 1193.
Hammon v. Com. of Int. Rev., 10 B. T. A. 43.
Doyle v. Com. of Int. Rev., 12 B. T. A. 1044.
Burling v. Com. of Int. Rev., 13 B. T. A. 264.

Wheelock v. Com. of Int. Rev., 13 B. T. A. 828.
Latham v. Com. of Int. Rev., 16 B. T. A. 48.
Hale v. Com. of Int. Rev., 18 B. T. A. 342.
Sugerman v. Com. of Int. Rev., 20 B. T. A. 960.
McClure v. Com. of Int. Rev., 20 B. T. A. 1127.
Baum v. Com. of Int. Rev., 21 B. T. A. 176.
Safe Deposit & Trust Co. v. Tait, 295 Fed. 429.
Rengstorff v. McLaughlin, 21 Fed. (2) 177.
Sizer et al. v. U. S., 65 Co. Cl. 450.
Luscomb v. Com. of Int. Rev., 9 B. T. A. 1070; affirmed by C. C. A. (2), 30 Fed. (2) 818.
Von Ruck v. Com. of Int. Rev., 14 B. T. A. 33; affirmed by C. C. A. (4), 44 Fed. (2) 476.
Neal v. Com. of Int. Rev., 16 B. T. A. 1058; affirmed by C. C. A. (8), 53 Fed. (2) 806.
Milliken v. U. S., 38 Fed. (2) 381 (Co. Cl.); affirmed by U. S. S. Ct., 51 S. Ct. 324, 326.
Brown v. Routzahn, decided by U. S. D. C., N. D. of Ohio, E. D., on Sept. 9, 1931, #1818 of Prentice-Hall 1931 Fed. Tax Service (not yet officially reported).

Perhaps it has never occurred to Congress or the collector that cases which the taxpayer estates have won, and where the gifts were held not to have been made in contemplation of death, were correctly decided.

It is respectfully submitted that the statute in question operates to deny the executors a fair opportunity to prove the truth, denies them their day in court, and therefore deprives them of their property without due process of law.

Point (2) Equal Protection.

The executors contend that this sentence also violates the due process clause of the Fifth Amendment, in that it denies equal protection of the laws.

Although the United States is not expressly prohibited in the Constitution from denying equal protection of the laws, as the states are by the Fourteenth Amendment, nevertheless, this Court has repeatedly held that, where there is no reasonable ground for selecting particular individuals or corporations, or classes of such, out of the general mass of individuals or corporations, a legislative enactment directed against such individuals or corporations amounts to a denial of due process of law as far as their property is concerned. In *Smyth v. Ames,* 169 U. S. 466, this Court reviewed the authorities, and throughout that case, indeed, the requirement of due process of law is treated as necessarily including equal protection within its scope.

The executors contend that there is no adequate basis for selecting non-testamentary gifts made within two or six years of death and taxing them and exempting *like* gifts made beyond such periods. The line drawn by the legislature is arbitrary, capricious and amounts to confiscation, denying equal protection of the laws and therefore denying due process of law. *Schlesinger v. Wisconsin, supra.*

A case very similar to the one at bar was the case of *Louisville Gas & Electric Company v. Coleman,* 277 U. S. 32. In that case this Court was called upon to pass upon the validity of a statute of the State of Kentucky (Ky. Stats., Carroll's Ed., 1922, §4019a-9), which provided in part:

> "A tax of twenty cents (20¢) is hereby imposed upon each one hundred dollars ($100.00) or

fraction thereof, in any contingency secured by any mortgage of property in this state, which mortgage shall be lodged for record after this Act goes into effect *where the indebtedness does not mature within five years.* * * *"

In holding the Kentucky statute invalid this Court said (p. 37):

"The equal protection clause, like the due process of law clause, is not susceptible to exact delineation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. * * * *mere difference is not enough*: * * *."

This Court then went on to comment upon the particular case and said (p. 38):

"* * * Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations, or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, *the only difference well may be that one is payable in 60 months and the other in 59 months.* * * *" (Italics supplied).

Mr. Justice Holmes, in dissenting from the majority opinion, said (p. 41):

"When a legal distinction is determined, as no one doubts that it may be, between day and night, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the *necessity* behind it, the

> line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But *when* it is seen that a line or point there *must* be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." (Italics supplied).

Mr. Justice Holmes indicated that the decision of the legislature must be accepted because of the "necessity" to draw a line and mark the place where the change occurs. He illustrated by citing the necessity to draw the line between "day and night, childhood and maturity, or any other extremes". But, is not this rule of necessity only applicable when a "change" actually takes place between opposite extremes, such as day merging into night or childhood into maturity?

In the case at bar the rule of necessity is not applicable, because there are no opposite extremes. A point of time, alone, is the legislative line of supposed change. Without more, time, itself, is not composed of opposite extremes, which merge or change one into the other. A gift made on Monday is no different than a *like* gift made on Tuesday. Consequently, the statute in question makes a distinction without a difference and this is arbitrary and capricious.

There is no attempt upon the part of Congress to distinguish between different values, for the values taxable in all cases are those "at death". Nor is there any attempt upon the part of Congress to distinguish between gifts of different percentages. Congress has not said, for instance, that gifts of 75% of a decedent's estate are conclusively presumed to have been made in contemplation of death, if within two years thereof, and

those of 25% are not. There is, therefore, no distinction based upon a difference in values or percentages.

Mr. Justice Holmes also indicated that it might be necessary to draw a line "gradually picked out by successive decisions" of this Court. This, presumably, is an alternative to, or at least a check upon, legislative action. By a process of elimination, through successive decisions, this Court, itself, would eventually be compelled to draw the line and find the fact.

To illustrate, there is now on the federal statute books a two-year law. If this two-year law be upheld by this Court, "not being very wide of any reasonable mark", then there will be two decisions of the same court, one upholding a two-year law and one rejecting a six-year law. A succeeding Congress may very likely then be tempted to increase the period to three years, as the Kentucky legislature did in *State Tax Commission v. Robinson's Executors, supra.* Or an appeal will be taken to this Court involving the Kentucky three-year period. This Court will then be called upon to determine whether or not the three-year period is "very wide of any reasonable mark", and so, case after case may reach this Court, each involving a different period between the two *judicial* extremes. Finally, this Court will be compelled to draw *its own* line.

Let it be supposed that the line is finally drawn midway between the judicial extremes at four years, and certainly it must be drawn sometime, somewhere, if the alternative rule of judicial elimination is followed. What situation will then exist? A situation where this Court will have decided that decedents on one side of the four-year line contemplate death and those on the other side do not, and this decision will be binding not only upon Congress but upon the forty-eight state legislatures.

Is this not a finding of fact by the judiciary—the very thing our Constitution prohibits? Was it not judicial legislation of facts that resulted in *Magna Charta*, the Bill of Rights and the Constitution? Would this Court be willing to find a fact for a litigant against his will? We believe not. It is the province of the jury to find facts.

The statute in question is no more valid than would be statutes which provided that all income tax returns filed after March 15th of any given year shall be deemed fraudulent, or that all judges who are in commission at the age of eighty years shall be deemed incompetent to serve thereafter and therefore must retire. Manifestly, such provisions would be arbitrary, because, in truth and in fact, the passage of time at a particular point does not, in itself, mark a change from honesty to fraud, competency to incompetency. Likewise, the passage of time at a particular point does not, in itself, mark a change from thoughts about life to thoughts about death.

It is, therefore, respectfully submitted that the dissenting opinion of Mr. Justice Holmes in the Louisville Gas and Electric Co. case is not applicable to a case such as the one at bar, where a point of time, alone, is the legislative line.

Classification for purposes of taxation is necessary and proper. But, it is one thing to classify physical objects, such as intoxicating liquor, oleomargarine, chain stores and the like, and another thing to classify intangibles such as thoughts. The individual should still be allowed his freedom of belief, intention and thought. If the individual can have no motive apart from the mass; if he is *compelled* to have the same thoughts as others; if, in short, the sovereignty can

legislate intention for one and all, then we are a despot, not a republic.

No other statute, so far as we are able to determine, except the Wisconsin and Kentucky statutes already declared invalid, has ever gone so far as to rigidly classify mentality, and then impose a burden upon one classification and exempt the other. The legislature might as well draw a fixed and unalterable line between honesty and fraud, negligence and care, sanity and dementia, ignorance and knowledge. If the statute in question be declared valid, it is then but a short step to legislation classifying speech and the press, for they are but the expressions of mentality; and yet the First Amendment prohibits Congress from "abridging the freedom of speech or of the press".

At the time of the adoption of the Constitution freedom of conscience was an acknowledged, inalienable right. Is it possible that conditions could become ever so modern and complicated that this inalienable right should be restrained? Do the needs of modern life require classification of the mental as well as the physical? True, the welfare of the community demands progressive and analytical legislation to meet modern conditions; but modern conditions do not even tolerate a classification of thought. On the contrary, the modern and liberal thinker demands absolute freedom of thought. Shall our modern doctrine of classification become top-heavy and cast us back into mediaeval civilization?

Reasonable men differ in their beliefs and intentions; which is all the more reason why intention should not be fixed by legislative definition. The foundations, not only of our Constitution, but of civilization, begin to totter at the thought of the validity of the statute in question. The history of the world attests the struggle for freedom of mind. It is the product of the ages. To

classify mentality, as this statute has done, would defeat the ideals and purposes for which this country was founded. No particular mental process should be fixed by legislative definition and other mental processes free.

It is respectfully submitted that mentality is, and of right ought to be, free and never subject to legislative fiat.

The legislature may provide for retroactive taxes, but whether transfers such as those here involved, will ever be taxed is, as said by the Court in *Frew v. Bowers*, 12 Fed. (2) 625 (p. 630):

> "* * * fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grevious injustice."

There was no classification of gifts in contemplation of death under prior revenue acts. The 1926 Act substituted a definition for a rule of evidence—a rigid classification for no classification at all. This Court is not concerned with whether a two year period may be reasonable in itself, but whether any period may be made the basis for a rigid classification of mentality. *Schlesinger v. Wisconsin, supra.*

In determining the validity of classification, the practical operation and effect of the legislation must be considered. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 401; *Near v. Minnesota, ex rel. Olson*, 51 S. Ct. 625, 628.

Specifically, then, how does the statute operate? If a gift, not in contemplation of death, is made 730 days before death, it is taxable, but if a *like* gift is made 731 days before death, it is exempt. This is the practical operation and effect. There is no adequate or reasonable basis for this classification. As said by this Court in the *Louisville Gas & Electric Co. case, supra*:

> "* * * the only difference well may be that one is payable in 60 months and the other in 59 months. * * *"

Furthermore, a gift of $5,000 or less, made within two years of death, is exempt from the tax. That is to say—if a $25,000 gift is made within two years of death, it is, for the purposes of the tax, made from two motives; $20,000 being motivated by thoughts of death and $5,000 by purposes associated with life. This also indicates the arbitrary nature of the statute, and much more so than the Wisconsin statute in the Schlesinger case.

It is respectfully submitted that the statute in question denies equal protection, in that it is arbitrary and capricious and therefore deprives the executors of their property without due process of law.

Question 2. If the Answer to the First Question Be in the Negative, Is the Second Sentence of Section 302(c) of the Revenue Act of 1926 Void Because Repugnant to Sections 1111, 1113(a), 1117 and 1122(c) of the Same Act?

Sections 1111, 1113(a), 1117 and 1122(c) of the Revenue Act of 1926 (appendix), taken as a whole, provide for a complete system of corrective justice whereby, after payment, actions may be instituted in court for the recovery of taxes illegally collected. This system is reasonable and complete and affords the taxpayer an opportunity to show in court that the taxes

paid by him were illegally and unlawfully assessed and collected. Being a system of "corrective" justice, *all* questions of law *and* fact upon which the tax was based are to be judicially determined. The system gives a taxpayer his complete day in court.

In the case of *Cheatham v. U. S.*, 92 U. S. 85, this Court said (p. 88):

> "* * * In these respects, the United States have, as was said by this court in *Nichols v. United States*, 7 Wall. 122, enacted a *system of corrective justice*, as well as a system of taxation, in both its customs and internal revenue branches. That system is intended to be *complete*. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and *test in the courts the validity of the tax.*" (Italics supplied)

To the same effect are the cases of *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 Howard 272; *State Railroad Tax Cases*, 92 U. S. 575; *Wickwire v. Reinecke*, 275 U. S. 101; *Fidelity & Columbia Trust Co. v. Lucas*, 7 Fed. (2) 146. In the latter case, the District Court said (p. 151):

> "Section 3226, Revised Statutes, *supra*, with but slight changes, had been in effect since 1866; and literally thousands of suits against collectors have been maintained under it. * * *"

There are only four theories upon which to lay estate taxes, viz: upon gifts transferred (1) through testacy, (2) through intestacy, (3) *inter vivos* but intended to take effect in possession or enjoyment at or

after death and (4) *inter vivos* but in contemplation of death. "Since 1866" taxpayers have had the right to test in court the application of the theory upon which their taxes have been collected and paid, and this right was not taken away by the Revenue Act of 1926, because Section 3226, Revised Statutes, was reenacted therein as Section 1113(a). There could hardly be any denial that under prior revenue acts the executors would have had the right to invoke this system of corrective justice to test in court the application of the fourth theory, if the government had collected taxes thereupon. In spite of the conclusive presumption, estate taxes on complete and irrevocable gifts *inter vivos*, made within two years of death, are nevertheless collectible under the 1926 Act *only* upon the application of the fourth theory. Consequently, after paying an estate tax under the Revenue Act of 1926 on a gift said to have been made in contemplation of death, the executors still have the right, under this system of corrective justice, to test in court the application of this theory to the gift.

If for over half a century Section 3226, Revised Statutes (1113(a) R. A. 1926), has been in force and effect, then it is the paramount expression of the legislative will, when compared with a contrary expression enacted for the first time in the Revenue Act of 1926.

In construing statutes it is a well settled principle that the last expression of the legislative will is the law, and that, if both expressions were enacted at the same time and it is impossible to reconcile them, then the last in order of arrangement prevails. *U. S. v. Jackson*, 143 Fed. 783.

The purpose of the second sentence of Section 302(c) is just the opposite of Section 1113(a). Instead of being a part of a system of corrective justice, it seeks to destroy justice by prohibiting proof of the truth. A provision which seeks to destroy justice is absolutely

irreconcilable with a provision which seeks to afford justice. If a taxpayer is deprived of his right to prove the truth by an earlier section, he cannot, in the same case and at the same time, be allowed to prove the truth by a later section. One of these sections must give way, and, where they are absolutely irreconcilable, the general rule is that the latest and paramount expression of the legislative will prevails.

The collector urges that if the second sentence of Section 302(c) is not in violation of the Fifth Amendment and does not deny the taxpayer due process, then intrinsically it is a legal enactment, and, if it is a legal enactment, the taxes collected under it were legally collected. True, a constitutional enactment, but not necessarily a legal enactment.

A statute may not violate the Constitution but still be illegal *for another reason.* Every statute declared illegal and void is not also unconstitutional. Rules of statutory construction such as repugnancy, duplicity, ambiguity, redundancy, surplusage or aptness of title, have nothing to do with constitutionality.

Consequently, the statute in question is void, in that it is repugnant to the later and paramount expression of the legislative will in the same act.

Conclusion.

It is, therefore, respectfully submitted that both the questions certified should be answered in the affirmative.

Respectfully submitted,

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APPENDIX.

Laws Cited.

Section 302 (a), (b), (c), (d), (e), (f) and (g), Revenue Act of 1926, 44 Stat. 70, 71.

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death.

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy; * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within *two years* prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be *deemed and held* to have been made in contemplation of death within the meaning of this title. Any

transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, * * *

(f) To the extent of any property passing under a general power of appointment * * *

(g) To the extent of the amount receivable by the executor as insurance * * *" (Italics supplied).

* * * * * *

Section 202 (b), Revenue Act of 1916, 39 Stat. 777, 778.

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, ex-

cept in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title"; (Italics supplied).

Section 402(c), Revenue Act of 1918, 40 Stat. 1097.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title;" (Italics supplied).

* * * * * * *

Section 402(c), Revenue Act of 1921, 42 Stat. 278.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a *bona fide* sale for a fair consider-

ation in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title;" (Italics supplied).

* * * * * * *

Section 302(c), Revenue Act of 1924, 43 Stat. 304.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of Part I of this title;" (Italics supplied).

Section 1111, Revenue Act of 1926, 44 Stat. 115.

"Section 3220 of the Revised Statutes, as amended, is amended to read as follows:

'Sec. 3220. Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be un-

justly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.'"

* * * * * * *

Section 1113 (a), Revenue Act of 1926, 44 Stat. 116.

"Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

'Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of

six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceedings relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'"

* * * * * *

Section 1117, Revenue Act of 1926, 44 Stat. 119.

"Section 177 of the Judicial Code, as amended, is amended to read as follows:

'Sec. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

'(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any over-payment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.'"

* * * * * *

Section 1122 (c), Revenue Act of 1926, 44 Stat. 121.

"The paragraph added by section 1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of section 24 of the Judicial Code, relating to the jurisdiction of district courts, as amended, is reenacted without change, as follows:

> 'Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.'"

* * * * * *

Fifth Amendment to the U. S. Constitution.

"No person shall * * * be deprived of life, liberty, or property without due process of law; * * *"